UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Robert JENKINS II Z251 98 5711

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2522

Robert JENKINS II

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By an order dated 2 April 1990, an Administrative Law Judge of the United States Coast Guard at Alameda, California revoked Appellant's Merchant Mariner's Document for use of a dangerous drug.

Appellant was charged with the use of dangerous drugs supported by a single specification alleging that Appellant, while the holder of the above-captioned document, did wrongfully use cocaine as evidenced in a urine specimen collected on 27 July 1989 which subsequently tested as positive for the presence of cocaine metabolite.

The hearing was held on 29 September, 5 October and 15 November 1989, and on 25, 26, 30, and 31 January 1990 and 9 February 1990. Appellant was absent at the 29 September and 15 November 1989 sessions. Appellant appeared at the 5 October 1989 session and at the sessions held in January and February 1990 and was represented by professional counsel. The Investigating Officer presented 27 exhibits which were admitted into evidence and introduced the testimony of six witnesses, and testified in his own behalf. Appellant entered the answer of deny to the charge and specification.

The Administrative Law Judge's written Order was issued on 2 April 1990. Appellant filed his notice of appeal on 27 April 1990 within the time period prescribed in 46 C.F.R. 5.703. Following receipt of the transcript of the proceedings, Appellant timely filed a supporting brief on 3 October 1990 Accordingly, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of the above-captioned document issued to him by the Coast Guard on 24 March 1980 at Norfolk, Virginia.

In May 1989, the Seafarers International Union (SIU) instituted a program of pre-employment drug testing of its members in order to comply with promulgated Coast Guard regulations. Appellant was a member of the SIU on 27 July 1989 and voluntarily submitted for a pre-employment drug screening test in order to qualify for employment through SIU.

SIU had contracted with the St. Mary's Comprehensive Health Center (hereinafter Health Center) in San Francisco, California, where SIU members could obtain the required drug test.

Health Center employees followed guidelines provided by the Nichols Institute Substance Abuse Testing Lab (NISAT) which tested the urine and where the testing personnel had received training. NISAT's procedures are approved by the National Institute On Drug Abuse (NIDA).

On 27 July 1989, the urine sample collection procedures were supervised by a licensed registered nurse. Appellant was identified by comparison with a photo-identification card. Appellant then

completed the required forms and submitted a urine sample. Appellant did not wash his hands immediately prior to providing the urine sample. The urine sample was sealed according to NISAT guidelines and given a control number. Appellant then executed a certification statement that he had provided the urine sample identified by the control number.

Appellant's urine sample was subsequently sent to NISAT's laboratory in compliance with NISAT's approved chain of custody procedure. Under an "Enzyme Immunoassay" screening process, the sample tested positive for the presence of cocaine metabolite. In the follow-up confirmatory test, a second portion of the sample was injected into a "Gas Chromatography/Mass Spectrometry" (GC/MS) instrument. Again, the sample tested positive for cocaine metabolite. The test result from the GC/MS analysis showed a concentration of 443.9 ng/ml of cocaine metabolite. Following NISAT procedure, the screening, confirmatory test and entire chain of custody were reviewed and found to conform with NISAT requirements. Subsequently, a "final report" showing positive results of the GC/MS confirmatory test was prepared on 1 August 1989.

NISAT's final report regarding Appellant's urine sample was forwarded to Greystone Health Sciences Corporation (Greystone), the contracted Medical Review Officer for SIU. Greystone assigned a forensic pathologist with 25 years experience to review the case. Following its review, Greystone determined that the positive test result was correct and transmitted this determination to Appellant on 1 August 1989.

On his own initiative, Appellant submitted an additional urine sample for analysis to NISAT on 11 August 1989. This sample tested negative for the presence of cocaine metabolite.

Cocaine remains detectable in the human body for two to three days after ingestion, with the longest time for detection being a maximum of five days after ingestion.

On 20 September 1989, Appellant was personally served with the charge and specification alleging that Appellant used a dangerous drug

as evidenced by the aforementioned tests.

Appearance: Ms. Andrea Adam-Brott, Esq., c/o Joel K. Rubenstein, Heller, Ehrman, White & McAuliffe, 333 Bush Street, San Francisco, CA 94104-2878.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Decision and Order of the Administrative Law Judge is not supported by a preponderance of the evidence because: (a) the Administrative Law Judge erroneously concluded that it was impossible for a small amount of cocaine to contaminate the urine sample and thereby cause a positive drug test result to occur and (b) the drug test conducted of Appellant's urine is unreliable and insufficient evidence to support the finding of proved to the charge and specification;

2. Appellant's due process rights were violated because "the best available technology" was not used in testing his urine sample. Specifically, Appellant was not required to wash his hands before providing the urine sample.

OPINION

I

Appellant's assertion that the Decision and Order is not

supported by a preponderance of evidence is without merit.

(a) Appellant asserts that the Administrative Law Judge erroneously concluded that the production of cocaine metabolite (glycylecogonine) is possible only through metabolic processes and not by intentional or accidental introduction of cocaine into the urine specimen. Appellant asserts that there is nothing in the record to support this conclusion reached by the Administrative Law Judge. Appellant urges that in fact the record supports the opposite conclusion - that cocaine placed directly in urine will spontaneously break down into glycylecogonine without any attendant metabolic processes. [TR 434, 435, 486, 491, 601].

I do not agree. Although Appellant's expert witness did testify that it was at least "feasible" for cocaine metabolite to be formed by introducing cocaine directly into the urine sample, that testimony was clearly inconclusive on this issue. Appellant's expert witness stated in pertinent part:

[C]ocaine is unstable in solution; it spontaneously breaks down to a metabolite . . . In cocaine, you could actually just drop the pure drug in a solution and there will be some spontaneous breakdown. So I do think it's at least, feasible. Those studies have not been done to really talk about whether or not it's a possibility. But we're talking about theoretically all the possibilities - - I mention that as one possibility. [TR 435-436]

Similarly, the testimony of Appellant's other expert [TR 601] does not substantially support the assertion that cocaine could be introduced into Appellant's urine sample and metabolize to the extent of causing the positive test result of 443.9 ng/ml.

The Administrative Law Judge further states that the record supported the conclusion that cocaine which might have been dropped into Appellant's urine would not have been metabolized by passing through Appellant's body and would not test positive as a "metabolite." [Decision and Order 23-24]. The Administrative Law Judge states that this conclusion is supported by the testimony of Appellant's expert witness and that of NISAT's Scientific Director. [Decision and Order 30].

I do agree with Appellant only to the extent that the aforementioned conclusion expressed by the Administrative Law Judge is not supported by the record, however, this does not amount to prejudicial error.

The entire issue of accidental introduction of cocaine powder into Appellant's urine sample is purely speculative. It is merely a theoretical possibility raised by Appellant of how the urine sample could have resulted in a positive reaction for cocaine metabolite. Appellant testified that he routinely encountered people that "act funny and stuff" and he has seen people occasionally use drugs. I don't know anything about the effect of [cocaine]. But I don't -- I see people use it, but I don't be around it . . . I try to stay from around it. [TR 513]

Accordingly, although appellant vaguely claims to have lived in a drug plagued environment, he has not demonstrated with any specificity that he or anyone else could have readily introduced cocaine to his hands and subsequently into his urine sample. Accordingly, there is no plausible evidence that Appellant or anyone else would have or could have introduced cocaine into his urine sample on 27 July 1989.

The Administrative Law Judge is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. Appeal Decisions 2519 (JEPSON); 2516 (ESTRADA); 2503 (MOULDS); 2492 (RATH). Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2519

(JEPSON); 2506 (SYVERSTEN); 2424 (CAVANAUGH) and 2282 (LITTLEFIELD).

(b) Appellant urges that the drug test conducted of his urine sample is unreliable and insufficient evidence to support the finding of proved to the charge and specification. I disagree.

Contrary to Appellant's assertion, the record clearly supports the finding of proved to the charge and specification of drug use.The

record reflects that adequate safeguards were employed by the registered nurse supervising the collection and sealing of the urine sample. [TR 216-225]. The record reflects that no irregularities in testing procedures and no chain of custody problems or irregularities of any significance were detected by the medical review officer. [TR 282-287, 401-403] The fact that an entry, consisting of a name, date and time, is crossed out on a laboratory worksheet [EXHIBIT 13] does not per se vitiate an otherwise proper chain of custody. As indicated by the NISAT representative, immediately above the crossed out entries, another qualified operator affixed her signature and a corresponding date and time. It is significant that both names affixed to the worksheet are those of NISAT laboratory operators who have authorized access to the urine samples. [TR 145-146]. There is no evidence that the operator who affixed her signature to the worksheet did not properly perform NISAT procedures. Neither is there any evidence that the operator whose entry was crossed out in any way adversely affected Appellant's urine sample. The witness's explanations of a clerical error or change of operator during the testing process are reasonable absent any evidence of tampering or a mix-up of the sample with that of other urine samples.

Additionally, Appellant's assertion that his urine sample might have been affected by 'carry-over contamination' from a highly positive sample tested immediately before Appellant's is without merit.

The record clearly reflects that sufficient clinical steps were taken at NISAT's laboratory to keep samples separate. [TR 188]. Furthermore, the record reflects that 'carry-over contamination', although theoretically possible, was practically implausible because of the washing and rinsing processes that were performed by injecting solvents through the containers and equipment between sample tests. [TR 170, 177-178, 632-634]. It is noteworthy that Appellant's own expert witness characterized NISAT's laboratory procedures to reduce or eliminate 'carry-over contamination' as "excellent." [TR 451]. Additionally, NISAT frequently conducted 'carry-over contamination' studies to ensure that false positive results from carry-over were precluded. These studies concluded that 'carry-over' contamination could not occur where as here the previous sample tested had a cocaine metabolite reading of 11,669 ng/ml. [TR 169-170].

Appellant asserts that the urine sample in issue is unreliable because Appellant was not compelled to wash his hands immediately prior to producing the urine sample. The record does reflect that the registered nurse who supervised the urine collection did not require Appellant to wash his hands. [TR 231-232]. This is corroborated by Appellant. [TR 500].

Having the individual wash his/her hands before providing a urine specimen is listed on the NISAT checklist. [EXHIBIT 16a]. However, this omission alone does not invalidate the urine sample. There is absolutely no evidence that the failure of Appellant to wash his hands caused the urine sample to test positive for cocaine metabolite. Appellant's assertion is based exclusively on speculation unfounded in fact. In the case herein, the chain of custody, laboratory procedures and medical review all substantially demonstrate that no irregularities of any significance occurred. Accordingly, the finding of proved will not be disturbed. The findings of the Administrative Law Judge will not be disturbed on review unless it can be shown that the evidence relied upon was inherently incredible. Appeal

Decisions 2506 (SYVERSTEN); 2492 (RATH); 2378 (CALICCHIO); 2333 (AYALA); 2302 (FRAPPIER).

II

Appellant asserts that his due process rights were violate d because he was not required to wash his hands before providing the urine sample. Appellant correctly points out that NIDA and NISAT guidelines require that an individual wash his/her hands before providing the urine sample. He also stresses that federal regulations, controlling drug testing, in 49 C.F.R. ÷40.25, require handwashing. Appellant also cites to the Mandatory Guidelines for Federal Workplace Drug Testing Programs promulgated in 53 Fed. Reg. 11971 (1988) which "require the use of the best available technology for ensuring the full reliability and accuracy of drug tests." Appellant asserts that handwashing is an essential element of "technology" which ensures the reliability of the drug test results.

Notwithstanding that handwashing is required in the aforementioned guidelines and regulations, its mere omission is not a violation of Appellant's due process rights and alone does not invalidate the results of the drug test.

I concur with the Administrative Law Judge that the handwashing requirement was promulgated primarily, not to protect the individual, but as an additional precaution to ensure that the urine sample is not surreptitiously adulterated by the individual providing the sample. The pertinent provisions of 49 C.F.R. ÷40.25 supports this interpretation.

(f) Integrity and identity of specimen. Employers shall take precautions to ensure that a urine specimen is not adulterated or diluted during the collection procedure and that information on the urine bottle and on the urine custody and control form can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified: . . . 5. The individual shall be instructed to wash and dry his or her hands prior to urination.

6. After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

The NIDA guidelines also cite handwashing on its checklist. [EXHIBIT 17, p. 5]. However, it is included with those other precautions addressed in the section regarding methods of intentionally subverting the urine sample. [EXHIBIT 17, p. 3].

Absent any proof that Appellant intentionally or accidentally introduced cocaine directly into his urine sample, the mere fact that he did not wash his hands will not invalidate the test result. Without evidence demonstrating an extrinsic source of the cocaine metabolite, and recognizing that the handwashing requirement is essentially a protection for the tester rather than the individual being tested, I cannot agree that the failure to require Appellant to wash his hands violated Appellant's rights to due process.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 2

April 1990 at Alameda, California is AFFIRMED.

/S/
MARTIN H. DANIELL
VICE ADMIRAL, U. S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D.C., this 26TH day of March, 1991.

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CITATIONS: Appeal Decisions cited: 2515 (JEPSON),2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2378 (CALICCHIO), 2333 (AYALA), 2302 (FRAPPIER).

NTSB Cases Cited: None

Federal Cases Cited: None

Statutes & Regulations Cited: 46 USC 7702, 46 CFR ÷5.701; 46 CFR ÷5.703; 46 CFR 5.701(b); 49 CFR 40.25.

***** END OF DECISION NO. 2522 *****